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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON, and H. DEAN SUMMERS, each of them individually, and the IDAHO STATE LIQUOR DISPENSARY,

Petitioners,

vs.

KRISTINE L. FANKELL,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF OF THE COMMONWEALTH OF KENTUCKY AND THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WISCONSIN AND THE TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF AMICI CURIAE

Every state-court system hears civil rights actions brought under 42 U.S.C. § 1983, and thousands of these actions are filed on a yearly basis. Qualified immunity, the primary defense raised by public officials against frivolous claims, is critically important to the effective operation of state government. By shielding good faith decisions and reasonable acts of public officers, the immunity ensures that the exercise of discretion by public officers is not chilled and that public interests continue to be served.

In federal courts, there is a right to immediately appeal a pre-trial denial of the qualified immunity defense. This Court has repeatedly stated that without an immediate appeal, one of the primary benefits of immunity, which is an immunity from discovery and from standing trial, is effectively lost. Yet, state courts are divided on whether a denial of a qualified immunity motion is immediately appealable in state court. Some state courts reason that under this Court's precedent, a state law that prohibits an immediate appeal of a pre-trial denial of qualified immunity effectively extinguishes the federal immunity and, therefore, is preempted. Other state courts have held the opposite, concluding a state law preventing an immediate appeal can be applied, even if the entitlement to immunity is thereby defeated. Amici curiae states hold a common view that the importance of this issue to state governments impacted by section 1983 litigation warrants further review of this case by this Court.

SUMMARY OF ARGUMENT

This Court held in *Felder v. Casey,* 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), that when section 1983 actions are brought in state courts, these courts must proceed in such a manner that the substantial rights of the parties under federal law are protected. Qualified immunity is a critical federal defense to public officials sued in state court and, under this Court's precedent, it should not be extinguished by state law. Nevertheless, while some state appellate courts acknowledge this principle and accept immediate appeals from pre-trial denials of qualified immunity, other state courts, by refusing to accept immediate appeals because of state procedural rules, are effectively eliminating the immunity in those cases when the trial court's initial determination was erroneous.

This split in the state appellate court decisions needs to be resolved. Qualified immunity is too important to the effective functioning of state government for it to be threatened in this manner. This Court held in *Scheuer v. Rhodes,* 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), held that when Congress enacted 42 U.S.C. § 1983, it did not intend to abrogate the immunity defenses and that these defenses are imperative to the sound exercise of discretion by public officials and the effective operation of government. The importance of this federal immunity defense is further enhanced by this Court's precedent that state law immunities cannot be raised in section 1983 litigation. *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). Further review is warranted in this case to protect the federal immunity defense and to clarify that this Court's precedent preempting state law that

defeats federal rights in section 1983 litigation applies to protect the rights of section 1983 defendants as well as section 1983 plaintiffs.

REASON FOR GRANTING THE PETITION

It Is Important To The States That This Court Clarify That A Denial Of Qualified Immunity In A Section 1983 Action Brought In State Court Is Immediately Appealable

In *Felder v. Casey,* 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988), this Court examined the circumstances under which state law is preempted when a section 1983 claim is brought in state court. *Felder* involved a procedural notice-of-claim statute that was being applied by the State of Wisconsin to section 1983 actions. This Court held that the notice-of-claim statute was preempted because it was inconsistent with federal law and would produce different outcomes in section 1983 litigation based solely on whether the claim was asserted in state or federal court. In reaching its decision, the court stated that while "States may establish the rules of procedure governing litigation in their own courts" when they "entertain a federally created cause of action, 'the federal right cannot be defeated by the forms of local practice.' " 487 U.S. at 138 quoting *Brown v. Western R. Co. Of Alabama,* 338 U.S. 294, 296, 70 S. Ct. 105, 106, 94 L. Ed. 100 (1949). The Court further stated that the "Supremacy Clause imposes on state courts a constitutional 'duty to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' " *Id* at 151, quoting *Garret v. Moore-McCormack Co.,* 317 U.S.

239, 245, 63 S. Ct. 246, 251, 87 L. Ed. 239 (1942). More recently, in *Howlett v. Rose*, 496 U.S. 356, 472, 110 S. Ct. 2430, 2441, 110 L. Ed. 2d 332 (1990), this Court, in holding that the Supremacy Clause prevented Florida from refusing to entertain a section 1983 claim against a school board on sovereign immunity grounds, reiterated that while states may generally apply their own "neutral procedural rules to federal claims," those rules can be "preempted by federal law."

Pursuant to *Felder*, a section 1983 defendant who is sued in state court should be entitled to an immediate appeal if the qualified immunity defense is denied at the trial court level. *Felder's* admonishment that a state court entertaining a federal action must proceed in such a manner that all the substantial rights of the parties are protected applies here. That the federal qualified immunity defense is a substantial right is clear. The immunity is so important that this Court recently held in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834, 113 L. Ed. 2d 773 (1996), which presents the federal analog of section 1983 actions against state actors, not only that the "right is important enough to support an immediate appeal," but that a defendant is entitled to two immediate appeals if he raises the immunity defense in both a motion to dismiss and later in a motion for summary judgment. That the immunity is completely sacrificed if a state court refuses to grant an immediate appeal following an erroneous trial court determination is also apparent. This Court has stated in both *Behrens* and *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, that the immunity is an entitlement not to stand trial and that

entitlement is irretrievably lost as soon as the case proceeds to litigation.

Relying on *Felder*, the appellate courts of several states have concluded that they must accept immediate appeals because of the primacy of federal law and the principle that the federal rights of the parties in section 1983 litigation cannot be extinguished by state law. *See City of Lakewood v. Brace*, 919 P.2d 231 (Colo. 1996); *Lord v. Murphy*, 561 A.2d 1013, 1016 (Mo. 1989); *McLin v. Trimble*, 795 P.2d 1035 (Okla. 1990). However, other state appellate courts have, in effect, concluded that section 1983 litigants take the state courts as they find them, regardless of whether state law defeats a substantial federal right or defense. *See, e.g., Klindtworth v. Burkett*, 477 N.W.2d 176 (N.D. 1991); *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 3d 132, 529 N.E.2d 1290 (Ct. App. 1987); *Noyola v. Flores*, 740 S.W.2d 493 (Tex. Ct. App. 1987). A third approach taken by state appellate courts is to grant an appellant review on a discretionary basis, allowing immediate review only on a case-by-case basis at the appellant court's discretion. *See Ex Parte Franklin County Dept. of Human Resources*, 674 So.2d 1277 (Ala. 1996); *Waldon v. City of Seattle*, 77 Wash. App. 784, 892 P.2d 745 (Ct. App. 1995); *Baxter v. Wisconsin Dept. of Natural Resources*, 165 Wis. 2d 293, 477 N.W.2d 648 (1992).

Amici curiae states believe that it is important that this conflict be resolved and the qualified immunity defense protected. Obviously, qualified immunity is critical to the thousands of state actors sued each year in state court as a protection against the depletion of resources and time that discovery imposes and the burdens of standing trial. Just as importantly, however, the immunity

defense is critical to the effective operation of state government. The immunity is a protection against attacks on reasonable official acts and decisions. By shielding reasonable official acts and decisions, the immunity serves the valuable purpose of protecting the efficient operation of government and ensuring that public officers need not have their actions and decision-making chilled by the fear of prolonged litigation over their reasonable exercise of discretion.

In *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), this Court held that Congress did not intend to abrogate the common law immunities when enacting 42 U.S.C. section 1983. The Court went on to reason that the qualified immunity defense is critical to the sound operation of government, stating "the public interest requires decisions and action to enforce laws for the protection of the public" and that "[i]mplicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." 416 U.S. at 241-42. This Court further observed that "the privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Id.*, quoting *Barr v. Matteo*, 360 U.S. 564, 572-73, 79 S. Ct. 1335, 1340, 3 L. Ed. 2d 1434 (1990).

It is of vital import to state government that the qualified immunity defense remain intact. As the law now stands, elements of a section 1983 claim cannot be extinguished by state law, including state procedural law,

see Felder v. Casey, supra, and a section 1983 defendant in state court cannot raise a state defense. *See Howlett v. Rose, supra.* The same principle that was applied in *Felder v. Casey* to section 1983 plaintiffs in state court should apply to section 1983 defendants. Congress did not intend that section 1983 defendants would be without immunity defenses, and the effective functioning of state government demands that the qualified immunity defense remain intact regardless of the forum in which a section 1983 claim is brought. Under *Felder,* state laws that defeat substantial rights of the parties in 1983 litigation are preempted. This principle should be applied to state procedural rules that, by rejecting an immediate appeal from a pretrial denial of a qualified immunity defense, effectively extinguishes the protection altogether. Moreover, when state actors are sued under federal law, their ability to present their federal defenses should not depend on the happenstance at which state-court system they are sued in.

Amici urge that further review in this case is warranted to clarify this important issue.

CONCLUSION

When Congress enacted 42 U.S.C. § 42, it did not intend to abrogate the immunity defenses. Qualified immunity is a critical defense not only to the individual section 1983 defendants sued in state court, but also to state government generally. The immunity, by protecting

the reasonable decisions and acts of public officials, protects the effective operation of government. State government cannot afford to have this defense extinguished and such was not Congress' intent. The immunity should not be defeated simply because of the forum in which a section 1983 claim is brought, yet this is what state rules that prohibit an immediate appeal from a pretrial denial of qualified immunity accomplish. This case presents this Court with an ideal opportunity to resolve the current split in state Supreme Court decisions regarding this issue and clarify that the principles articulated in *Felder v. Casey*, apply to section 1983 defendants, as well as to plaintiffs.

Amici urge this Court to grant the Petition and issue a Writ of Certiorari to the Supreme Court of the State of Idaho.

Respectfully submitted,

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